Supreme Court, U.S.
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No. 03-113

In the Supreme Court of the United States

PRESTIGE FORD,

Petitioner,

v.

DEALER COMPUTER SERVICES, INC.,
FORMERLY KNOWN AS FORD DEALER COMPUTER SERVICES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

JAMES D. BLUME
Counsel of Record

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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

Petitioner hereby moves, pursuant to Rule 44.2 of the Supreme Court Rules, for rehearing on their Petition for Writ of Certiorari. In support thereof, Petitioner makes the following arguments: 1) This Court should vacate the arbitration award because Petitioner was denied a fundamentally fair hearing and 2) this Court should vacate the arbitration award pursuant to the public policy exception that was judicially created by this Court in *W.R. Grace and Co. v. Local Union No. 759*, 461 U.S. 757 (1983) and *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987).

1. This Court should vacate the arbitration award because Petitioner was denied a fundamentally fair hearing.

Arbitrators are not bound by the formal rules of procedure and evidence, and the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing. *See National Boatland, Inc. v. ITT Commercial Finance Corp.*, No. 99-1301, 2000 U.S. App. LEXIS 24783, at *6-7 (6th Cir. Sept. 19, 2000) *See also National Post Office v. U.S. Postal Serv.*, 751 F.2d 834, 841 (6th Cir. 1985). Fundamental fairness requires only notice, an opportunity to present relevant and material evidence and arguments to the arbitrators, and an absence of bias on the part of the arbitrators. *See Bowles Financial Group, Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1013 (10th Cir. 1994). *See also Israel Salei v. Shearson Lehman Brothers, Inc.*, No. 95-CV-75376-DT, 1996 U.S. Dist. LEXIS 7620, at *12 (E.D. Mich. Apr. 30, 1996). Vacatur is appropriate only when the exclusion of relevant

evidence so affects the rights of a party that it may be said the party was deprived of a fair hearing. *See Israel Salei*, No. 95-CV-75376-DT, 1996 U.S. Dist. LEXIS 7620, at *14 (citing *Hoteles Condado Beach, La Concha and Convention Ctr. v. Union de Tronquistas Local 901*, 763 F.2d 34, 39-40 (1st Cir. 1985)). This is because the arbitrator is not bound to hear all of the evidence tendered by the parties; however, the arbitrator must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments. *See Israel Salei*, No. 95-CV-75376-DT, 1996 U.S. Dist. LEXIS 7620, at *14 (citing *Hoteles Condado Beach, La Concha and Convention Ctr.*, 763 F.2d at 39).

Petitioner did not have the following material evidence at his disposal for presentation to the arbitration panel for the following reasons: 1) the complete revenue and expense portion of the general ledger because although the arbitration panel ordered Respondent to produce it, it did not;[1] 2) Texas franchise tax reports [2] because the arbitration panel denied Petitioner's Motion to Compel; 3) Respondent's tax returns[3] because the arbitration panel denied Petitioner's Motion to

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[1] The revenue and expense portion as produced contained no cash account and no expenses attributable solely to Respondent. See App. J at 52 and App. I at 44-48 to Petitioner's Petition for Writ of Certiorari.

[2] App. K at 63 to Petition for Writ of Certiorari.

[3] App. O at 103, App. H at 35-40, App. Q at 108-111 to Petition for Writ of Certiorari.

Compel; and 4) the complete financial statements[4] because the arbitration panel denied Petitioner's Motion to Compel.

This evidence was relevant and material and not simply collateral to the elements of Petitioner's claims. Moreover, it was not cumulative of other evidence Petitioner presented. *See National Post Office*, 751 F.2d at 841. See Appendices H, I, J, M, and Q to Petition for Writ of Certiorari. By refusing Petitioner the right to present this evidence, the arbitration panel eviscerated Petitioner's ability to present any material evidence in support of its counterclaims for breach of contract, fraud, and anti-trust violations. The net effect of which prevented Petitioner from meeting its burden of proof and thereby depriving Petitioner of a fundamentally fair hearing.

2. This Court should vacate the arbitration award pursuant to the public policy exception judicially created by this Court in *W.R. Grace and Co. v. Local Union No. 759*, 461 U.S. 757, 766 (1983) and *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987).

The public policy exception is a judicially-created exception that provides an additional basis for reversing an arbitration award where the terms of the arbitration contract, either expressly or as interpreted by the arbitrators, violate public policy or where the award requires parties to undertake some action in violation of public policy. *See Bowles Financial Group, Inc.*, 22 F.3d at 1013 (citing *Misco, Inc.*, 484 U.S. at 42-44). *See also W.R. Grace and Co.*, 461 U.S.

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[4] App. K, O, App. H at 35-40, App. Q at 108-111 to Petition for Writ of Certiorari.

at 766; *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993). A court may refuse to enforce a contract where the specific terms contained in the contract violate public policy. *See Misco, Inc.*, 484 U.S. at 36. The decision to reverse an award must be based on explicit conflict with other laws and legal precedents rather than an assessment of general considerations of supposed public interests. *See id.* at 43 (quoting *W.R. Grace and Co.*, 461 U.S. at 766).

To prove that a contract is unconscionable under Michigan law, a plaintiff must demonstrate that the arbitration provision is both procedurally and substantively unconscionable. *See Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp.2d 1087, 1100 (W.D. Mich. 2000) (citations omitted). In order to determine whether a contract is procedurally unconscionable, courts typically consider the relative bargaining power of the parties, their relative economic strength, whether the contract is expressed in standardized language prepared by the stronger party to meet its needs, and whether it is offered to the weaker party on a "take it or leave it" basis. *See id.* at 1100 (citations omitted). Where a contract is prepared by one party and offered for rejection or acceptance without the opportunity for bargaining under circumstances in which the party cannot obtain the desired product or service except by acquiescing to the form agreement, Michigan courts will conclude that the contract is adhesive and therefore procedurally unconscionable. *See Lozada*, 91 F. Supp.2d at 1100-01.

In the instant case, the contract entered into by Petitioner was both procedurally and substantively unconscionable making it void as against public policy. Mr. Randall Reed, the dealer-principal of Petitioner, executed the contract with Respondent. Mr. Reed stated during the arbitration hearing

that Ford Motor Company told Ford dealers that it was no longer going to support the existing Texas Instruments computer systems in the dealerships and that each dealership needed to purchase a new computer system from Ford Dealer Computer Services, Inc. See Appendix A, Arbitration, Day 3, pages 82-85. Despite using business cards with the Ford logo on them and at all times representing itself to be a division of Ford Motor Company, neither Ford Motor Company nor Ford Computer Dealer Services, Inc. as Respondent was then known, (hereinafter "DCS f/k/a FDCS" or "Respondent") explained to the dealerships that DCS f/k/a FDCS was not affiliated with Ford Motor Company. See Appendix A, Arbitration, Day 3, pages 82-85. Mr. Reed further testified that he told DCS f/k/a FDCS sales representatives that under no circumstances would he agree to enter into the contract for a term of longer than five years. See Appendix A, Arbitration, Day 3, pages 98-100. Approximately one year after Petitioner had entered into the contract, DCS f/k/a FDCS presented Petitioner an amendment to the contract containing a provision extending the term of the entire contract to ten years. See Appendix A, Arbitration, Day 3, page 98. Mr. Reed signed this amendment without it ever being explained to him. See Appendix A, Arbitration, Day 3, page 99-100. In sum, Respondent took advantage of its supposed affiliation with Ford Motor Company to secure Petitioner's original agreement to the contract and then submitted the amendment containing the ten year term extension to Petitioner on a take it or leave it basis. Given the foregoing, it is clear that the contract itself was procedurally unconscionable.

The contract was substantively unconscionable because it required the dealer to submit all of its claims arising out of the contract to arbitration but it allowed DCS f/k/a FDCS to pursue its available remedies at law. Section 18 states

"[c]ollection of any accrued amounts owed by Dealer to DCS f/k/a FDCS (and not disputed in writing with specificity within a reasonable period from the invoice date) shall not be subject to this arbitration procedure." See Appendix B, Section 18. Section 13 states that in the event a dealer breaches the agreement, DCS f/k/a FDCS may accelerate any and all amounts due to become immediately payable. See Appendix B, Section 13. DCS f/k/a FDCS's right to declare all amounts due and payable immediately and then pursue its rights to collect these amounts outside of the arbitration provision nullifies the arbitration provision.

Additionally, the contract is replete with one-sided terms and unfair provisions. *See Lozada*, 91 F. Supp. 2d at 1102. The following list is not exhaustive: the dealer waives its right to recover for breaches of any express or implied warranties with regard to DCS f/k/a FDCS's software, hardware, maintenance, and licensing services. See Exhibit B, Sections 2, 4, 5, 8. DCS f/k/a FDCS reserves all of its rights and remedies at law and at equity for the software. See Exhibit B, 7. DCS f/k/a FDCS limits its liability for monetary damages in the contract. See Exhibit B, Sections 2, 4, 5, 8. A dealer waives and releases its claims against DCS f/k/a FDCS for other types of claims and liabilities. See for example, Appendix B, Section 7.

Because the contract reserves rights for Respondent that were not available to Petitioner, both the contract and the arbitration provision were substantively unconscionable. Based on the foregoing proof of both procedural and substantive unconscionability, this Court should find the contract unconscionable and apply the public policy exception to vacate the arbitration award.

At least one circuit court, the Ninth Circuit Court of

Appeals, has found in favor of a dealer who sought to rescind its contract with DCS f/k/a FDCS. In *James Ford, Inc. v. Ford Dealer Computer Services, Inc.*, No. 01-16067, 2003 WL 245220, at *1 (9th Cir. Jan. 31, 2003), James Ford, Inc. made virtually the same factual and legal allegations against Respondent that Petitioner has made here. James Ford sued DCS f/k/a FDCS and Universal Computer Systems, Inc. for fraud, breach of contract, and violations of the California Unfair Competition Act. *See id.* at *1. The contract signed by James Ford was almost identical to the contract signed by Petitioner.[5] The arbitrator rescinded the contract, identifying multiple grounds for rescission, including FDCS's fraudulent representations, the computer system's failure to serve its essential purpose, and FDCS's violations of the California Unfair Competition Act. *See id.* This Court should follow the Ninth Circuit Court of Appeals' lead and rescind the contract.

CONCLUSION

This Court should vacate the arbitration award because Petitioner was denied its right to present relevant and material evidence in deprivation of its right to a fundamentally fair hearing. In the alternative, this Court should find the contract itself both procedurally and substantively unconscionable and apply the public policy exception to vacate the arbitration award. By vacating the arbitration award on either ground, this Court will restore public confidence in arbitration as a

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[5] Respondent used the same standardized contract for each dealership with whom it contracted changing them somewhat from year to year. James Ford signed its contract with DCS f/k/a FDCS on or about July 13, 1994. Petitioner executed its contract with Respondent in January 1993.

fair and efficient alternative to litigation and it will protect the public against one of arbitration's inherent hazards, the possibility of being denied a fundamentally fair hearing guaranteed by the 5th and 14th Amendments to the United States Constitution.

Respectfully submitted,

BLUME & STODDARD,

By : James D. Blume
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I, James D. Blume, certify as follows:

1. I am the attorney for Petitioner in this case. I prepared this Petition For Rehearing of Petition For Writ of Certiorari.

2. Pursuant to Rule 44.2 of the Supreme Court Rules, I certify that I have limited this Petition For Rehearing to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

3. This Petition is presented in good faith and not for the purpose of delay.

DATED: Oct 30, 2003.

Respectfully submitted,

BLUME & STODDARD,

By: James D. Blume
James D. Blume
Attorney for Petitioner

APPENDIX A

AMERICAN ARBITRATION ASSOCIATION

NO. 54-117-00326-98

Ford Dealer Computer Services, Inc., n/k/a Dealer Computer Services, Inc.	)
	)
v.	)
	)
Prestige Ford.	)
	)

ARBITRATION - DAY 3

AUGUST 8, 2001

TAKEN BY: JACK D. SYKES,
CSR, STATE OF TEXAS

APPEARANCES

THE ARBITRATION PANEL

Michael L. Beatty, Esq.
Robert A. Gammage, Esq.
Lawrence R. Abramczyk, Esq.

FOR THE CLAIMANT

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N. Henry Simpson, III
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Dallas, Texas 75201

ALSO PRESENT

Karen Lahrman, Paralegal
Michael Karkhoff, Prestige Ford

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MR. ALLEN: We are willing to do that.

MR. BLUME: And just to show you, I have cut my direct down as short as it is going to get.

RANDALL REED,
having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION

QUESTIONS BY MR. BLUME:

Q. Would you tell us your name, please, sir?

A. Randall L. Reed.

Q. What is your address, Mr. Reed?

A. Business address, 333 Inwood Road, Dallas, 75235.

Q. And what is that address?

A. Park Cities Ford.

Q. Is that one of the dealerships that you are currently involved in?

A. Yes, sir.

Q. Tell the panel briefly, if you would, your educational

background before you went into the car business.

A. Grew up in Littleton, Colorado. Attended Columbine High School, graduated in 1977. Attended

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generally called the front of the store, the sales department?

A. The front end, yes, sir.

Q. And then, also, there is another part of the dealership that is involved with parts, service, body shop and related entities, correct?

A. Correct.

Q. And who is the head of that section fo the store?

A. I had two, beginning with Phil Paulson, and then Mike Karkhoff.

Q. And so - - that's called the back of the store, right?

A. Correct.

Q. So it would have been you who hired Mr. Karkhoff here to be the parts and service director?

A. Mike was my parts manager at the time. And, yes, he was promoted up to parts and service director.

Q. Okay. Let me direct your attention back now to 1993.

Were there changes in the computer world for dealers in that era; do you recall any of those?

A. Yes, sir, I do. Primarily, we were on the DCS box, which was then owned by Ford Motor Company,

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which was in the process of selling out to Universal Computer Services. And it was told to us that they would no longer support the TI system that was in operation, and that we needed to make a change.

Q. Who was it that told you that TI wasn't going to - - that the TI system that you had was not going to be - -

A. Ford Motor Company.

Q. You knew, I gather from your comments, that Dealer Computer Services department was being sold to UCS.

A. Yes, sir.

Q. Did you know what the relationship between Ford and UCS and DCS was; exactly?

A. No, sir.

Q. Open, if you would - - there's the blue notebook that's right under your deposition. Would you open that to Tab. No. 9. Do you see there a bunch - - do you see there a bunch of cards that have been copied?

A. Yes.

Q. Are those the kinds of business cards you were provided by UCS representatives?

A. The one with the Ford logo?

Q. Well, either or both.

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A. Primarily, it was the Ford logo on the business cards. Those are the people I dealt with.

Q. Did you ever hear the Ford Dealer Computer Services was a preferred vendor?

A. Absolutely.

Q. What did that mean to you?

A. That meant that Ford, which was in, obviously, the process of selling their computer system, DCS, to UCS, recommended, highly recommended, UCS as the dealership system.

Q. Well, when you were told the TI system was no longer going to be supported, did you make the decision that you needed to obtain a new computer system?

A. Yes, sir.

Q. And you just intimated - - I want to get clear about this - -

did Ford representatives encourage you to buy a system from Ford Dealer Computer Services?

A. Yes, sir.

Q. What did they do to encourage you?

A. Well, they offered incentives on the system, telling us that basically if we would purchase the new computer they would give use the actual box, the mainframe for free. So all we would have to pay for

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is any peripheral and licensing.

Q. Okay. Did FDCS representatives call on you during this period of time.
A. Yes.

Q. How often?

A. Weekly, if not daily.

Q. And these were sales calls?

A. Yes, primarily.

Q. And do you recall who the salesmen were that came to see you?

A. The two that most - - were most predominant in my mind were Tom Russell and Guy Nickisea (phon).

Q. Do you remember a representative of theirs named Ray Hoffman?

A. I would probably recognize him if I saw him, but the name doesn't mean anything.

Q. He is not here in the room, is he? None of these gentlemen are Mr. Hoffman? You don't think so?

A. I don't think so.

Q. Okay. Did you - - do you recall what you were told about the computer itself, the box, as you termed it?

A. The mainframe?

Q. Yes.

A. It was the fastest, most advanced system

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the main - - the term of the main contract from five years to 10?

A. No, not that I recall.

Q. Did you ever tell DCS representatives that you would not agree to extend past five years?

A. From day one.

MR. BEATTY: 803

Q. Did you agree, in the course of this amendment, that you wold extend the term from five years to 10?

A. No, not to my knowledge.

Q. If it were true that Paragraph 1 attempts to do that, that is, extend the term from five to 10, is that something you agreed to?

A. I never would have agreed to that.

Q. What is the date - - turn back, I think it's four pages, Randy. Turn back to the - - no, no. Go the other way. What is the date on Amendment 17?

A. The Amendment 17?

Q. Yeah. The one you just looked at. I want to know what the date on it is.

A. 12-28-94.

Q. How long after your initial installation of the computer would that have been?

A. Approximately a year.

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Q. Were you so satisfied with this DCS computer that you agreed to extend the term from five years to 10?

A. No.

Q. Did you understand that language in Paragraph 1? Let me rephrase the question. Did you notice the language?

A. No.

Q. Was it explained to you by any DCS representative?

A. No.

Q. Did you have a discussion with a DCS representative about changing the term in any way, shape or form at the time?

A. Not on this contract. I knew that CPD was 84 months. I knew that wasn't an option. That was never offered in any shorter term.

Q. Is it your understanding, then that it was 84 months or nothing, on CPD contract?

A. Yes.

Q. You didn't like that very much, but you agreed to it?

A. Yeah. It was just a small part of the system.

Q. Do you remember ever, at any time, a DCS
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salesman coming to you and saying - - and asking you if you would agree to an extension on the main contract?

A. No.

MR. BLUME: Pass the witness

CROSS EXAMINATION

QUESTIONS BY MR. ALLEN:

Q. Mr. Reed, I want to talk to you initially about your background and experience. You have been working in dealerships since approximately 1981, is that correct?

A. In sales - - in the sales side of dealerships, yes. I was in the fixed-in side of it earlier than that.

Q. When you were at - - that's when you first started at Courtesy as a salesman, right?

A. Yes, sir.

Q. And then you worked for - - after two years you became a finance manager, right?

A. Yes, sir.

Q. And after three years as finance manager, you became a sales manager, right?

A. Yes, sir.

Q. And after you were a sales manager, you became a general manager, did you not?

APPENDIX B

FORD DEALER COMPUTER SERVICES, INC.

This Agreement is between: Prestige Ford
Name

3401 S. Garland Rd.
Address

Garland, TX 75041
City State Zip

hereinafter referred to as Dealer, and FORD DEALER COMPUTER SERVICES, INC., hereinafter referred to as FDCS.

THIS AGREEMENT IS SUBJECT TO ARBITRATION UNDER APPLICABLE STATUTE.

SECTION 1. DEFINITIONS.

* * *

SECTION 2. SALE OF EQUIPMENT.

FDCS agrees to sell to Dealer and Dealer agrees to buy. the Equipment listed in Schedule A, subject to the terms and conditions of this Agreement.

* * *

E. Disclaimer of Equipment Warranties and Limitation of Liability.

FDCS warrants that the computer Equipment covered in this Agreement will perform according to the written specifications published by FDCS. Dealer acknowledges and agrees that FDCS is not the original manufacturer of the computer Equipment covered in this Agreement.

FDCS does not warrant that any specific level of system availability (up-time) will be achieved. Dealer acknowledges and agrees that the operation of an on-line computer system is a task of the highest level of technical complexity and that computer systems, like all mechanical devices, are subject to breakdown. Dealer further acknowledges and agrees that lack of system availability (down-time) does not constitute a breach of this Agreement.

EXCEPT AS SPECIFICALLY PROVIDED HEREIN, THERE ARE NO WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE MADE BY FDCS WITH RESPECT TO THE EQUIPMENT COVERED UNDER THIS AGREEMENT: IN NO EVENT SHALL FDCS BE LIABLE TO DEALER FOR LOSS OF PROFITS OR OTHER ECONOMIC LOSS, SPECIAL, CONSEQUENTIAL OR INCIDENTAL DAMAGES, EVEN IF IT HAS BEEN APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING. FDCS SHALL NOT BE LIABLE FOR ANY DAMAGES CAUSED BY DELAY IN DELIVERY. INSTALLATION OR FURNISHING OF THE EQUIPMENT UNDER THIS AGREEMENT.

THE SOLE AND EXCLUSIVE REMEDY OF DEALER FOR LIABILITY OF ANY KIND WITH RESPECT TO THE EQUIPMENT IS REPAIR OR REPLACEMENT OF THE EQUIPMENT. IN NO EVENT SHALL FDCS' LIABILITY FOR DAMAGES WITH RESPECT TO ANY OF THE EQUIPMENT FURNISHED UNDER THIS AGREEMENT EXCEED THE CHARGES PREVIOUSLY PAID BY DEALER ATTRIBUTABLE TO SAID ITEM.

* * *

SECTION 4. EQUIPMENT MAINTENANCE SERVICES

FDCS will provide Remedial Maintenance services upon the Equipment listed in Schedule C.

* * *

H. Disclaimer of Equipment Maintenance Warranties and Limitation of Liability.

FDCS warrants that so long as Dealer pays the Monthly Maintenance Charge on a timely basis that FDCS will perform Remedial Maintenance as necessary to return any failed piece of Equipment covered by this Agreement to operational condition during the term of this Agreement.

Dealer acknowledges and agrees that the maintenance of data-processing equipment is an undertaking of considerable technical complexity. Therefore, Dealer agrees that FDCS' responsibilities for Remedial Maintenance extend only to making a reasonable and good faith effort to repair the Equipment until it is returned to operational order.

Although FDCS will make a reasonable and good faith effort to resolve any Remedial Maintenance problems and return any Equipment covered by this Agreement to operational order, FDCS does not warrant any of the following:

1. That the Equipment covered herein will achieve any specific level of usability or reliability.

2. That any piece of Equipment repaired under this Agreement will always be repaired on the first attempt.

3. That the repair of any piece of Equipment will be achieved in any specific set amount of time.

4. That the Equipment will be enhanced, improved, or otherwise modified.

Dealer relieves FDCS of any liability resulting from any Equipment outage or failure other than that caused by FDCS' failure to make reasonable and good faith effort to perform Remedial Maintenance on the Equipment covered under this Agreement.

EXCEPT AS SPECIFICALLY PROVIDED HEREIN, THERE ARE NO WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE MADE BY FDCS WITH RESPECT TO THE MAINTENANCE SERVICES, FURNISHING OF PARTS, INSTALLATION OF EQUIPMENT OR OTHER TRANSACTIONS CONTEMPLATED HEREIN.

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, FDCS SHALL NOT, UNDER ANY CIRCUMSTANCES, BE LIABLE TO DEALER FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, EVEN IF FDCS HAS BEEN APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING. IN NO EVENT SHALL FDCS' LIABILITY TO DEALER ARISING OUT OF THIS AGREEMENT EXCEED THE AMOUNT REPRESENTED BY THAT PORTION OF THE MONTHLY MAINTENANCE CHARGES ATTRIBUTABLE TO ANY NON-OPERATIONAL ITEM OF EQUIPMENT.

SECTION 5. SOFTWARE LICENSE.

* * *

C. Confidentiality.

* * *

Because of the unique and proprietary nature of the Licensed Software, Dealer agrees that FDCS' remedies at law for a breach of confidentiality by Dealer or its employees are inadequate and that FDCS shall be entitled to equitable relief, including without limitation, injunctive relief, specific performance or other equitable remedies in addition to all other remedies provided at law or in equity.

D. Disclaimer of Software Warranties and Limitation of Liability.

FDCS warrants that the Licensed Software shall conform in all material respects to the design specifications and functions and will perform on the machines and with operating systems for which it is designed. If FDCS is not informed in writing of non-conformance due to errors which significantly affect performance of the Licensed Software in accordance with the design specifications and functions within the first five (5) days after installation, the Licensed Software shall be deemed to be conforming at the time of installation. Thereafter, FDCS will provide Application Program Consulting Services as described in this Agreement.

Dealer agrees that the inability, of any FDCS Program to perform a function that it was not designed or intended to do is not a defect. Dealer further agrees that at the time of signing this Agreement it has examined the operation of the FDCS Operating System and Application Programs and found their functions to be complete and satisfactory for Dealer's purposes. Dealer further agrees that prior to signing this Agreement it has verified independently the fact that these same Programs operate successfully in other dealerships. Dealer understands and agrees that in order for any Application Program to be successfully installed, Dealer's employees must be sufficiently intelligent, motivated, and have sufficient time to devote to the installation.

FDCS does not warrant that any specific degree of system availability (up-time) will be achieved. Dealer acknowledges and agrees that the operation of an on-line computer system is an undertaking of the highest degree of complexity and that some system outage (down-time) is inevitable. Dealer further acknowledges and agrees that lack of system availability (down-time) will not constitute a breach of this Agreement.

Dealer, therefore, agrees because of the foregoing facts that failure to obtain desired results is not the fault of FDCS Software and that no liability shall fall on FDCS for Dealer's failing to obtain results that it desires.

Dealer acknowledges that Dealer may be subject to federal, state and/or local laws or other governmental requirements regarding Dealer's use or retention of data maintained as part of Dealer's FDCS In-Dealership Computer System (e.g. Payroll, Human Resource Management), and Dealer further acknowledges and agrees that Dealer is solely responsible for determining and complying with such laws or requirements.

EXCEPT AS SPECIFICALLY PROVIDED HEREIN, THERE ARE NO WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE MADE BY FDCS WITH RESPECT TO THE LICENSED SOFTWARE OR OTHER TRANSACTIONS OR SERVICES CONTEMPLATED HEREIN. THIS AGREEMENT STATES THE ENTIRE OBLIGATION OF FDCS IN CONNECTION WITH THE LICENSE, INSTALLATION, SUPPORT OR OTHER TRANSACTIONS WITH RESPECT TO THE SOFTWARE.

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, FDCS SHALL NOT UNDER ANY CIRCUMSTANCES, BE LIABLE TO DEALER FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, EVEN IF FDCS HAS BEEN APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING. FURTHERMORE,

FDCS SHALL NOT BE LIABLE TO DEALER FOR DAMAGE OR LOSS OF ANY NATURE, WHATSOEVER, AND DEALER'S SOLE AND EXCLUSIVE REMEDY HEREUNDER SHALL BE THE RIGHT TO HAVE FDCS REPLACE OR CORRECT MATERIALLY DEFECTIVE SOFTWARE. IN ANY EVENT, IF FOR ANY REASON FDCS IS NOT ABLE TO REPLACE OR CORRECT MATERIALLY DEFECTIVE SOFTWARE, FDCS SHALL NOT BE LIABLE TO DEALER FOR ANY AMOUNT GREATER THAN THE AMOUNT PAID BY DEALER TO FDCS FOR THE DEFECTIVE SOFTWARE.

* * *

SECTION 7. SOFTWARE SUPPORT SERVICES.

* * *

C. Manufacturer's Data.

* * *

Dealer hereby waives and releases all claims of any nature whatsoever against FDCS and relieves FDCS of all liabilities due to errors, omissions, and delays in the manufacturer's date (including pricing data).

* * *

SECTION 8. ON-LINE PARTS AND VEHICLE LOCATOR SERVICE.

FDCS will provide Dealer access to the On-Line Parts and Vehicle Locator Service for the charges stated in Schedule E.

* * *

C. Permission to Disclose Dealer Data.

The very essence of the On-Line Parts and Vehicle Locator Service is the sharing of data regarding parts and vehicle inventories among the clients of FDCS. Dealer therefore authorizes FDCS to provide Dealer's parts and vehicle inventory data to all other clients of FDCS.

D. Disclaimer of On-Line Parts and Vehicle Locator Service Warranties and Limitation of Liability.

FDCS represents that so long as Dealer pays the charges stated in Schedule E for connection to the On-Line Parts and Vehicle Locator Service, FDCS will make every reasonable effort to provide the On-Line Parts and Vehicle Locator Service to Dealer during the term of this Agreement. However, Dealer acknowledges and agrees that providing this Locator Service is an undertaking of the highest technical complexity. Dealer further acknowledges and agrees that in order for FDCS to provide this Locator Service, FDCS requires the services of other subcontractors, including Ford Motor Company and various communications companies, and the agreements that FDCS has with these subcontractors may not provide any recourse to FDCS in the event such subcontractor fails to perform as required.

DEALER THEREFORE RELEASES FDCS FROM ANY LIABILITIES WHATSOEVER FOR FAILURE TO PROVIDE ACCESS TO THE ON-LINE PARTS AND VEHICLE LOCATOR SERVICE (DOWN-TIME), FOR ANY FAILURE BY THIRD PARTIES, OR FOR ANY

OTHER REASON BEYOND FDCS' REASONABLE CONTROL.

EXCEPT AS SPECIFICALLY PROVIDED HEREIN, THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE MADE BY FDCS WITH RESPECT TO THE ON-LINE PARTS AND VEHICLE LOCATOR SERVICE OR ANY OTHER SERVICES CONTEMPLATED HEREIN.

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, FDCS SHALL NOT, UNDER ANY CIRCUMSTANCES, BE LIABLE TO DEALER FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, EVEN IF IT HAS BEEN APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING. DEALER'S SOLE AND EXCLUSIVE REMEDY HEREUNDER SHALL BE RESTORATION OF THE PARTS AND VEHICLE LOCATOR SERVICE.

* * *

SECTION 10. TERM AND EXTENSION OF AGREEMENT.

The term of this Agreement shall be for eighty-four (84) months from the date when the computer system is operational ('Original Term'), such date to be conclusively designated by FDCS. Following the expiration of the Original Term, this Agreement shall automatically be extended for like periods ('Extension Term'), unless either party gives the other written

notice to terminate one hundred eighty (180) days prior to the expiration of the Original Term or the then current Extension Term.

* * *

SECTION 13. DEFAULT.

In the event that Dealer defaults in any of the following ways:

A. By failing to pay any amount due hereunder in accordance with this Agreement; and/or

B. By otherwise being in breach of this Agreement; and/or

C. By becoming bankrupt or insolvent, or if a Petition is filed by or against the Dealer as bankrupt, insolvent, or a debtor under any federal or state bankruptcy, insolvency or reorganization law; and/or

D. By ceasing or threatening to cease to carry on Dealer's business; and/or

E. By making or proposing to make any sale of Dealer's assets in bulk or out of the ordinary course of Dealer's business; and/or

F. If FDCS in good faith deems the continued performance of Dealer hereunder to be insecure;

FDCS may pursue any one or more of the following remedies:

A. Declare all amounts due and to become due, immediately due and payable;

B. Suspend all Equipment maintenance and Software support services;

C. Demand and receive back all Equipment for which the total purchase price for such Equipment has not been paid;

D. Demand that Dealer immediately cease use of all FDCS Licensed Software and return to FDCS all copies of FDCS Licensed Software (including all Licensed Copies and Documentation) in Dealer's possession; and, in the event that Dealer does not voluntarily comply with such demand, an agent or representative of FDCS may enter upon Dealer's premises and disable or retrieve all FDCS Licensed Software;

E. Terminate this Agreement;

F. Retain all or such portion of payments made by Dealer hereunder as may be necessary to compensate FDCS for any damage, loss, liability, cost or expense (including, without limitation, payments to third parties) caused by such breach, default or failure, or, receive any additional payments from Dealer as may be necessary to compensate FDCS as described herein;

G. Pursue any additional or alternative remedies available at law or in equity.

Dealer agrees to reimburse FDCS for any and all expenses FDCS may incur, including reasonable attorneys' fees, in

collection of amounts due under this Agreement and in taking any of the foregoing actions.

* * *

SECTION 18. DISPUTE RESOLUTION.

The parties shall seek to resolve any controversy between them, first, by negotiating with each other in good faith negotiations between the respective principals of the parties; and, then, if negotiation is unsuccessful, by arbitration.

Except as provided otherwise in this Agreement, all disputes, claims, controversies and other matters in question between the parties to this Agreement, arising out of, of relating to this Agreement, or to the breach thereof, including any claim in which either party is demanding monetary damages of any nature including negligence, strict liability or intentional acts or omissions by either party, and which cannot be resolved by the parties, shall be settled by arbitration in accordance with the arbitration procedure described below. Collection of any accrued amounts owed by Dealer to FDCS (and not disputed in writing with specificity within a reasonable period from the invoice date) shall not be subject to this arbitration procedure. This arbitration procedure shall in no way limit FDCS' remedies as provided in Section 13.

Arbitration Procedure:

A. Either party may demand arbitration by providing the other party written notice of such demand. A matter will

then be deemed submitted to arbitration unless a valid reason exists as to why no legitimate dispute, claim or controversy exists.

B. All such matters shall be submitted to arbitration in Detroit, Michigan to be arbitrated by a person agreed upon by the parties to the dispute. If the parties cannot agree on an arbitrator within fifteen (15) days of receipt of the arbitration demand, and if both parties agree, a panel of three arbitrators shall be selected as follows: each party may select one arbitrator, to be selected within fifteen (15) days of the date both parties have agreed to select a panel, and both such arbitrators shall agree on a third arbitrator; if the two arbitrators so chosen cannot agree on the choice for a third arbitrator within fifteen (15) days thereafter, such third arbitrator will be chosen by a District Judge serving Wayne County, Michigan. If the parties have failed to agree on one arbitrator, and if either party does not agree to a panel of three arbitrators as described in the preceding sentence, the arbitrator shall be chosen by a District Judge serving Wayne County, Michigan. Any such arbitrators shall be chosen from a panel of persons with knowledge of electronic data processing industry practices, contracts, and data processing systems and without a demonstrable bias for or against either party.

C. Once a matter has been submitted to arbitration, the parties agree to schedule the arbitration hearing at the earliest possible date, but in no event more than sixty (60) days after the selection of the arbitrator or arbitration panel, except for legitimate and material reasons solely outside a party's control. However, such party shall have the burden of showing that any such delay is necessary for legitimate and

material reasons before the arbitrator or arbitration panel prior to the expiration of the 60-day period. Except as otherwise provided in this subsection, if a party's failure to cooperate in the scheduling of an arbitration hearing within the 60-day period shall result in any additional costs due to such delay (including but not limited to arbitration expenses and reasonable attorney's fees), such party shall reimburse the other party for any and all such costs.

D. Except as otherwise provided herein, the arbitration shall be governed by the commercial arbitration rules of the American Arbitration Association unless the parties agree to other rules and procedures.

E. In no event shall the demand for arbitration be made more than one (1) year after the claim or cause, of action arises.

F. The award of the arbitrator or arbitration panel shall be final and binding, and there shall be no appeal therefrom. Judgment upon the award rendered by the arbitrator or arbitration panel may be entered in any court having jurisdiction.

* * *

Executed as of the 28th day of January, 1993

Accepted By:

Ford Dealer Computer Services, Inc.
I000 Town Center
Suite 350

Southfield, Michigan 48075

By: /s/ Ken Bunney
Title: Controller
Date: 3-25-03

Dealer: P & A Code: 02415
Prestige Ford
3410 S. Garland Road
Garland, TX 75041

By: /s/ R.L. Reed
Title: Dealer
Date: 01/28/93

Ford Dealer Computer Services Contract

SEE

FOLD OUT EXHIBIT
CONTRACT AMENDMENT
NO. 17

FORD DEALER COMPUTER SERVICES, INC.

CONTRACT AMENDMENT NO.17

In accordance with Section 19, Paragraph B, of the Agreement between Ford Dealer Computer Services, Inc. and Prestige Ford, dated January 28, 1993, the parties hereby agree to amend the provisions of the Agreement as follows:

1.

2.

3.

This amendment in no way changes, terminates, or waives any other provision of this Agreement.

Executed as of the 29 day of December, 1994.

Accepted By:

Ford Dealer Computer Services, Inc.
1000 Town Center, Suite 350
Southfield, MI 48075

By: R. M. Nalley

Name: R. M. Nalley

Title: Executive Vice President

Date: 1/10/95

Dealer: D&A Code: 02415

Prestige Ford
3401 S. Garland Rd.
Garland, TX 75041

By: X

Name: X Randall C. Hoss

Title: X Dealer

Date: X 12-29-94